SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1962

No. 506

UNITED STATES, APPELLANT,

vs.

JERRY BRAVERMAN

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF CALIFORNIA

INDEX

(File endorsement omitted)

2 IN UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF CALIFORNIA
CENTRAL DIVISION

February, 1962 Grand Jury

No. 30912-CD

UNITED STATES OF AMERICA, *Plaintiff*,

v.

JERRY BRAVERMAN, *Defendant*.

Indictment—Filed June 6, 1962

(49 USC 41(1): Unlawful Solicitation of Concession and Rebate Respecting the Transportation of Property in Interstate Commerce).

The Grand Jury charges:

COUNT ONE

(49 USC 41(1))

(1) At all times mentioned in this Indictment, Andrew Jergens Company, a corporation, with its principal office in Cincinnati, Ohio, was and is engaged in the manufacture, distribution, and sales of various and sundry cosmetics and toiletries, and maintains a distribution office and warehouse at Burbank, California; that said Andrew Jergens Company shipped and ships various and sundry of its products from its warehouse at Burbank, California, in interstate commerce utilizing various modes and methods of transportation, including Superior Fast Freight, a freight forwarder; and that defendant JERRY BRAVERMAN was employed by Andrew Jergens Company at Burbank, California, as transportation manager.

(2) Superior Fast Freight, a corporation with its principal office at Seattle, Washington, was and is a freight forwarder subject to the Interstate Commerce Act and the Acts of Congress amendatory thereof and supple-
3 mental thereto, and as such freight forwarder had published and filed with the Interstate Commerce Commission tariffs of its rates and charges; and that Rob-

ert C. Harmonson was vice president and general manager, and L. E. Hoppy was district sales manager of Superior Fast Freight; and that Marvin Pratt was general sales manager and Eugene Allen was a traffic solicitor of Superior Fast Freight.

(3) During the period of January 23, 1962, to March 6, 1962, Andrew Jergens Company had tendered to Superior Fast Freight at Los Angeles, California, for transportation in interstate commerce various and numerous shipments of freight, including the following specified representative shipments:

(4) Superior Fast Freight

Freight Bills No. 20061, dated February 8, 1962
No. 21379, dated February 13, 1962
No. 21382, dated February 13, 1962
No. 23088, dated February 13, 1962

covering the transportation of freight from Burbank, California to points in Oregon and Washington.

(5) On or about January 20, 1962, in Los Angeles County, California, within the Central Division of the Southern District of California, defendant JERRY BRAVERMAN did knowingly solicit from said Eugene Allen of Superior Fast Freight a concession and rebate in the amount of two percent of the total freight bill revenues which Superior Fast Freight would receive in respect to any property to be tendered to it by Andrew Jergens Company at Burbank and Los Angeles, California, for transportation in interstate commerce, whereby the property of said Andrew Jergens Company would have been transported at a less rate and charge than that named in the applicable tariffs of Superior Fast Freight published and filed with the Interstate Commerce Commission.

4 COUNT TWO

(49 USC 41(1))

On or about February 12, 1962, in Los Angeles County, California, within the Central Division of the Southern District of California, defendant JERRY BRAVERMAN, did knowingly solicit from said L. E. Hoppy and Marvin Pratt of Superior Fast Freight a concession and rebate in the

amount of two, one hundred dollar bills from Superior Fast Freight in respect to any property tendered to it after February 1, 1962, by Andrew Jergens Company at Burbank and Los Angeles, California, for transportation in interstate commerce, whereby the property of said Andrew Jergens Company would have been transported at a less rate and charge than that named in the applicable tariffs of Superior Fast Freight published and filed with the Interstate Commerce Commission.

The Grand Jury realleges paragraphs one, two, three and four of Count One.

COUNT THREE

(49 USC 41(1))

On or about February 21, 1962, in Los Angeles County, California, within the Central Division of the Southern District of California, the defendant JERRY BRAVERMAN did knowingly solicit from Robert C. Harmonson and L. E. Hoppy of Superior Fast Freight a concession and rebate in the amount of $150 for every $3,000 in freight revenues which said Superior Fast Freight received in respect to any property tendered it after February 1, 1962, by Andrew Jergens Company at Burbank and Los Angeles, California, for transportation in interstate commerce, whereby the property of said Andrew Jergens Company would have been transported at a less rate and charge than that named in the applicable tariffs of Superior Fast Freight published and filed with the Interstate Commerce Commission.

The Grand Jury realleges paragraphs one, two, three and four of Count One.

A TRUE BILL

DONALD H. PACKER
Foreman

FRANCIS C. WHELAN
Francis C. Whelan
United States Attorney

(File endorsement omitted)

IN UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF CALIFORNIA
CENTRAL DIVISION

No. 30912-CD

(Title omitted)

Trial Memorandum—Filed June 21, 1962

[49 USC 41(1): Unlawful Solicitation of Concession and Rebate Respecting the Transportation of Property in Interstate Commerce]

I

Pre-Trial Statement as to the Status of the Case

A. This case is scheduled for trial on Tuesday, June 26, 1962, at 9:30 A.M., before the Honorable Wm. C. Mathes;

B. Estimated duration of trial is one day;

C. The defendant is at liberty, no warrant having been issued;

D. An interpreter will not be necessary;

E. Jury has not been waived;

F. The Indictment is in three counts, each alleging a solicitation of a rebate and concession by the defendant from Superior Fast Freight, a freight forwarder subject to the Interstate Commerce Act. The result of the solicitation would have been the transportation of property in interstate commerce at rates less than those filed and published with the Interstate Commerce Commission.

G. *Quotation of the Statute Involved:*

7 ". . . and it shall be unlawful for *any person*, persons, or corporation to offer, grant, or give, or to solicit, accept, or receive any rebate, concession, or discrimination in respect to the transportation of any property in interstate or foreign commerce

by any common carrier subject to said Chapter *whereby any such property shall by any device whatever be transported at a less rate than that named in the tariffs . . .*"

(49 U.S.C. § 41 (1), emphasis added).

H. *Elements of Each Offense:*

The solicitation of any rebate or concession by any person . . .

In respect to the transportation of any property in interstate transportation . . .

By any common carrier subject to the Interstate Commerce Act . . .

Whereby the property shall by any device be transported at a less rate than that named in the tariffs published with the Interstate Commission.

I. *Unusual Issues of Law*

1. *As to Evidentiary Questions:*

Extrajudicial statements, offered only to prove that the statements were made, and not to prove the truth of the assertion, are not subject to the hearsay rule, and are admissible. *N.L.R.B.* v. *Thomas Drayage and Rigging Co.* (C A 9th-1953), 206 F. 2d
8 857; *United States* v. *Mesarosh* (C A 3rd-1955), 223 F. 2d 449, reversed on other grounds, *Mesarosh* v. *United States* (1956), 352 U.S. 1; *U. S.* v. *Companaro* (D.C. Penn-1945), 63 F. Supp. 811; *6 Wigmore on Evidence* (1940 Ed), § 1766.

2. *As to substantive Law Questions:*

The language of the statute under which this action is brought is sufficiently broad to prohibit the alleged conduct of the defendant. (See § G of this memorandum, *supra*). And this is true even though the employer of a defendant so situated may not have known of or condoned that conduct, (*United States* v. *Miller*, (D.C. Neb. 1937), 18 F. Supp. 389. See also *Howitt* v. *United States*, (1945), 328 U.S. 189, and *Union Pacific Railroad Co.* v. *United States*,

(1940), 313 U.S. 450); and irrespective of whether or not the shipping company was to receive any advantage or discrimination in its favor as a result of the action by its employee.

While the cases decided under the Elkins Act have involved some advantage or discrimination in favor of the shipper, this is not a mandatory requirement of the Act. As stated by the Court in *United States* v. *Miller* (supra): "*The purpose of the statute* [Elkins Act], *is to protect the carrier, as well as the shipper.*" (Emphasis and brackets added, at p. 391).

In *Vandalia Railroad Co.* v. *United States*, (C A 7th-1915), 226 F. 713, the Court said: "The statute evidently aims to prohibit, not only dis-
9 crimination as between shippers, but departure from the tariff rates, irrespective of its actual discriminatory effect." (p. 716). Under the plain wording of the statute, it can be said that "the statute evidently aims to prohibit, not only discrimination as between shippers, but departure from the tariff rates, irrespective of its actual discriminatory effect" or conference of an advantage *on the shipper.*

Also, the Court in the *Miller* case (supra), points out that the legislative history of the Elkins Act shows an intent to "put an end to interference with the even flow of interstate commerce on the part of any one, whether person or corporation. An essence of the offense is interference, aside from the gain or loss occasioned thereby." (pp. 390-391).

Section 1021(g) of Title 49 of the United States Code, makes freight forwarders subject to the Elkins Act.

II

Pre-Trial Opening Statement

The United States expects to prove all of the operative allegations contained in the indictment, including the following:

A. Defendant JERRY BRAVERMAN had authority over the shipment of merchandise from the Andrew Jergens Company, at all times relevant to this case.

B. On or about January 20, 1962, defendant BRAVERMAN orally solicited from an employee of Superior Fast Freight Company, a rebate or concession in respect to the interstate shipment of merchandise. The amount of this rebate or concession was expressed in the form of a percentage of the total freight revenues of merchandise placed with Superior Fast Freight Co., by the Jergens Company.

C. On or about February 12, 1962, defendant BRAVERMAN orally solicited from two employees of Superior Fast Freight Company, a rebate or concession in respect to the interstate shipment of merchandise by the Jergens Company. The amount of this rebate or concession was expressed in the form of "two bills" per month.

D. On or about February 21, 1962, defendant BRAVERMAN orally solicited from an officer and from an employee of Superior Fast Freight Company, a rebate or concession in respect to the interstate shipment of merchandise by the Jergens Company. The amount of this rebate or concession was expressed in the form of $150 for every $3,000 in freight revenues tendered by the Jergens Company.

E. At all times herein mentioned, Superior Fast Freight was a freight forwarder, and subject to the Interstate Commerce Act.

Respectfully submitted,

FRANCIS C. WHELAN
United States Attorney

THOMAS R. SHERIDAN
Assistant U. S. Attorney
Chief, Criminal Section

CHARLES M. GARY COOPER
Charles M. Gary Cooper
Assistant U. S. Attorney

CERTIFICATE OF SERVICE BY MAIL

(Omitted in printing)

12 IN UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF CALIFORNIA
CENTRAL DIVISION

No. 30,912 Criminal

(Title omitted)

PRESENT: HON. WM. M. BYRNE, District Judge;

. . . . . .

Minute Order Rearraignment and Plea—June 18, 1962

PROCEEDINGS: For arraignment and plea. Indictment in three counts.

Defendant is arraigned and states his true name is as set forth in the Indictment, and pleads not guilty to each of the three counts.

COURT ORDERS this case transferred to Judge Mathes for all further proceedings.

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13 IN UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF CALIFORNIA
CENTRAL DIVISION

No. 30,912 Criminal

U.S.A. vs. JERRY BRAVERMAN

PRESENT: HON. WM. C. MATHES, District Judge;

. . . . . .

Minute Order Setting Cause for Jury Trial—June 18, 1962

PROCEEDINGS: For setting for jury trial.

Counsel make statements.

COURT ORDERS cause set for an estimated two days jury trial commencing June 26, 1962, 9:30 AM, and for call of the calendar on June 25, 1962, 1:30 PM, and defendant meantime remain on O/R.

14 IN UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF CALIFORNIA
CENTRAL DIVISION

No. 30,912 Criminal

(Title omitted)

PRESENT: HON. WM. C. MATHES, District Judge;

* * * * * * * * * * *

Minute Order Recall of the Calendar—June 25, 1962

PROCEEDINGS: For call of the calendar. Indictment in three counts.

Counsel estimate case will take one and one-half to two days to try by jury. COURT ORDERS cause set for jury trial June 26, 1962, 9:30 AM.

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15 IN UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF CALIFORNIA
CENTRAL DIVISION

No. 30,912 Criminal

(Title omitted)

PRESENT: HON. WM. C. MATHES, District Judge;

* * * * * * * * * * *

Minute Order Re Dismissing Indictment—June 26, 1962

PROCEEDINGS: For jury trial. Indictment in three counts.

Court convenes at 10 AM. All present as shown.

All members of counsel, defendant, and the reporter approach the bench out of hearing of the prospective jurors. A general conference is had among counsel and Court. Legal citations are presented by both sides.

Counsel for Gov't having represented to the Court that the solicitations alleged in the Indictment were for the

personal benefit of defendant, and not for the benefit of the shipper by whom he was employed, the Court construes the Indictment as not alleging a public offense under the Federal Statute; and, upon motion by defendant, ORDERS the Indictment dismissed without prejudice to the prosecution of the defendant for an offense within the provisions of Title 49 USC, Sec. 41(1), if the plaintiff be so advised.

(File endorsement omitted)

16 IN UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF CALIFORNIA
CENTRAL DIVISION

No. 30912—Criminal

(Title omitted)

Reporter's Transcript of Proceedings—June 26, 1962

HONORABLE WILLIAM C. MATHES, JUDGE PRESIDING

* * * * * * * * * *

17 **Appearances**

For the Plaintiff: FRANCIS C. WHELAN,
United States Attorney,
By: CHARLES M. GARY COOPER,
Assistant United States Attorney,
600 Federal Building,
Los Angeles, California.

For the Defendant: CHARLES L. LIPPITT,
14423 Hamlin Street,
Van Nuys, California.

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18 LOS ANGELES, CALIFORNIA, TUESDAY, JUNE 26, 1962.
10:45 A.M.

Colloquy Between Court and Counsel

The Court: 30912, United States v. Jerry Braverman.
Mr. Lippitt: Ready for the defendant.
Mr. Cooper: Ready for the Government, your Honor.

The Court: I will ask counsel to approach the bench with the defendant.

(The following proceedings were had at the bench, out of the hearing of the jury venire, with counsel and the defendant present:)

The Court: Is it stipulated, gentlemen, these proceedings take place at the bench in the presence of the defendant, outside the hearing of the jury panel?

Mr. Lippitt: So stipulated.

Mr. Cooper: So stipulated.

The Court: What is the punishment for this offense? Is this a misdemeanor?

Mr. Cooper: There is a jail sentence, is my understanding of the statute, your Honor, up to 20 years, and there is either/or a fine.

The Court: The statute says:

"Every person or corporation, whether carrier or shipper, who shall, knowingly, offer,"

and so forth,

"solicits rebate . . . shall be deemed guilty of a misdemeanor, and on conviction thereof shall be punished by a fine of not less than $1,000 nor more than $20,000: *Provided*, That any person, or any officer or director of any corporation subject to the provisions of sections 41, 42, or 43 of this title, or of chapter 1 of this title, or any receiver, trustee, lessee, agent, or person acting for or employed by any such corporation, who shall be convicted as aforesaid, shall in addition to the fine herein provided for, be liable to imprisonment in the penitentiary for a term of not exceeding two years, or both such fine and imprisonment, in the discretion of the court."

Is this defendant in that category?

Mr. Cooper: Yes, sir.

The Court: Tell me where so I will know. Where does he fall, which one is he?

Mr. Cooper: He would be a person—

The Court: Of course, he is a person.

Mr. Cooper: —subject to the Act.

The Court: It doesn't say "subject to the Act". It says, "That any person, . . . subject to the provisions of sections 41, 42, or 43 of this title,—"

Mr. Cooper: Subject to 41(1) then.

The Court: "—or of this chapter 1 of this title".

20 Mr. Cooper: He is subject to Section 41(1). The previous clause would indicate the operative fact giving rise to the offense, starting with the words—

The Court: Do you expect to contend this is a felony?

Mr. Cooper: Yes, your Honor. The indictment has to be so broad—

The Court: I know, but I say, do you expect to prosecute it as a felony?

Mr. Cooper: Yes, we do.

Mr. Lippitt: Under the statute, Mr. Cooper?

Mr. Cooper: Under the statute.

Mr. Lippitt: I don't know under what theory. The statute calls it a misdemeanor.

The Court: Well, the statute also says, "That any person, . . . subject to the provisions of sections 41,—" Is this 41?

Mr. Cooper: That is 41, your Honor, the Elkins Act.

The Court: "who shall be convicted as aforesaid, shall in addition—"

Of course, the fine is against the corporation, too, because of this provision down here in 41, subsection (2):

"In construing and enforcing the provisions of this section, the act, omission, or failure of any officer,

21 agent, or other person acting for or employed by any common carrier, or shipper, acting within the scope of his employment, shall in every case be also deemed to be the act, omission, or failure of such carrier or shipper as well as that of the person."

So, of course, the fine would apply only to the corporation.

How do you say this defendant is subject to the provisions?

Mr. Cooper: May I get my copy of the Code from counsel table, your Honor?

The Court: Yes. As I read it, that doesn't mean this defendant, unless he is a carrier or a shipper that would be subject to the Act. Otherwise, there wouldn't be any

point in putting all that surplus language. All they need to say is, "Any person who violates this —" All the rest of it would be surplusage. "Any person or any officer of a corporation subject to this Act". Who are subject to the Act?

Mr. Cooper: The shippers, carriers.

The Court: But he isn't a shipper.

Mr. Cooper: He is not, but I would read it that it is unlawful for any person to solicit,—

The Court: Certainly.

Mr. Cooper: —which is here alleged.

The Court: I have read that. Otherwise you
22 wouldn't be here.

He is not subject to the Act in the sense it is meant there. I will so rule. This is a misdemeanor unless you have some authority binding me.

Mr. Cooper: I have several cases.

The Court: All this man could be guilty of is solicitation.

Mr. Lippitt: At worst.

Mr. Cooper: With respect to "transportation of any property in interstate commerce"—

The Court: If you have any authority to the contrary,—

Mr. Cooper: There are no cases directly in point.

The Court: Then I have ruled that it is a misdemeanor.

Mr. Cooper: Then the case would proceed as a misdemeanor?

The Court: Yes.

Mr. Cooper: Under the statute?

The Court: Otherwise, if you prosecute as a felony, you would have to prove willfulness, specific intent. But, as I read it, there is no point in all that language there, Mr. Cooper,—

Mr. Cooper: You are talking just about applicability of the jail sentence?

23 The Court: That is all I am talking about. Everybody is subject to the Act in the sense they can be guilty of a violation of the penal provisions. But when they say "subject to the Act", they mean subject as shipper or carrier to the Act.

Mr. Cooper: You mean it would have to be an officer of the shipping company?

The Court: No. It would have to be a person who is a carrier. A person can be a carrier, a person can be a shipper. Or it can be an officer or a director of any corporation that is a carrier or shipper.

Mr. Cooper: So it would either be a private shipper that would be subject to jail sentence or an officer of the offending corporation.

The Court: I take it there is no law against an individual being a common carrier.

Mr. Cooper: No.

The Court: Any individual can be a shipper. But any other person—that it is a misdemeanor, a person who is subject to the provisions of this Act, and apparently your contention would be any carrier or shipper would know that and would know this law and some other individual might not know the law.

Mr. Lippitt: Exactly. Our contention—

The Court: We must, unless the statute is clear,
24 rule it to be a misdemeanor. If it were not that way, then the statute would say, "Provided any person who violates this shall, in addition to the fine, be subject to imprisonment." That is all you need say, isn't it?

It isn't to be assumed that Congress put in all this language about:

"That any person, or any officer or director of any corporation subject to the provisions of sections 41, 42, or 43 of this title, or of chapter 1 of this title, or any receiver, trustee, lessee, agent, or person acting for or employed by any such corporation,"

all that could be thrown out the window. All they would have to do is just say, "Any person that is convicted of a violation shall in addition", and then I would rule, if that were true, that Congress intended to make a person guilty of a felony, because a corporation—a misdemeanor, because you can't put a corporation in jail.

Mr. Cooper: Could I ask a question, your Honor?

The Court: Yes.

Mr. Cooper: The sentence you are speaking of, "That any person, . . . of any corporation subject to the provisions of sections 41, 42, or 43," it is a person of a corporation subject to the Act.

The Court: No, no. "Every person or corporation,—"

25 Mr. Cooper: "any person, . . . of any corporation—"

The Court: "*Provided*, That any person, or any officer or director of any corporation—"

Mr. Cooper: It is disjunctive, your Honor.

The Court: Yes. "*Provided*, That any person, or any officer or director of any corporation subject to the provisions of sections 41, 42, or 43 of this title, or of chapter 1 of this title, or any receiver, trustee, lessee, agent, or person acting for or employed by any such corporation, who shall be convicted as aforesaid—"

Mr. Cooper: Standing alone, "any person", then followed by a disjunctive clause completely.

The Court: Then why would all that be in there?

Mr. Cooper: To get both.

The Court: "Any person" would get it, wouldn't it?

Mr. Lippitt: Period.

The Court: Do you find any other criminal statute that says, "any person and or any officer, director"?

Mr. Cooper: Why do they put it in the disjunctive, your Honor, "or any officer or director of any corporation"?

The Court: Because a person, as I have just said—now, we get into the habit of thinking only corporations can be such and such. People get into the habit of thinking only corporations can be a carrier. Individuals can

26 be carriers, individuals or shippers—I assume individuals or carriers, and they are subject to the Act, presumably know the statute, know the law, and if they do it they are guilty of a felony. But if just an ordinary John Doe does it, he could come in and say, "I didn't know it was against the law to solicit." Then you would have to convict him of a misdemeanor at worst, in any event. That is the way I would rule, Mr. Cooper. I don't know whether that changes your view of the situation or not.

Mr. Lippitt: Well, our contention, of course, in the entire proceedings, your Honor, is that the indictment as charged does not come within the purview of this statute.

We have quashed one indictment in this matter and I did not make another motion to quash this, feeling I would just as soon go to trial and put an end to this, and make

my motion to dismiss at the end of the Government's case, because I don't think if they proved all of this, then this would still come within the purview of the statute, reading it as you do and as I do.

The statute is quite clear, and I would like to point out to your Honor that there is no comma between--

The Court: No comma between what?

Mr. Lippitt: In the statute itself, if the court please, that no person shall solicit, so on and so forth, and there is no comma which would in any way cause a dis-
27 crimination, et cetera. In other words, they tie it together, but I can't see how the Government can in any way prove—

The Court: "it shall be unlawful for any person, . . . to offer, grant, or give, or to solicit, accept, or receive any rebate, concession, or discrimination in respect to the transportation of any property in interstate or foreign commerce by any common carrier subject to this chapter whereby—"

there is no comma there.

Mr. Cooper: "whereby any such property shall by any device whatever be transported at a less rate than that named in the tariffs published and filed by such carrier."

The Court: Wasn't this property transferred?

Mr. Lippitt: Nothing was done, there wasn't even a solicitation, or acceptance of the solicitation.

Mr. Cooper: There was a solicitation that would look forward to a future shipment at lower cost than the rate published.

Mr. Lippitt: There is no law in the law books—I don't think Congress intended—I think they threw these words in as surplusage. They tied it in with the factual receiving of a rebate.

The Court: Solicit a rebate, which would have that
28 effect.

Mr. Cooper: "whereby any such property shall by any device whatever be transported".

The Court: You would have to prove that the effect of the rebate would be to transport this property at less than the tariff. That is what it amounts to. Can you do that?

Mr. Cooper: Your Honor, we would submit that would follow as a matter of law.

The Court: Oh, no, no. For instance, if this man, working for the Jergens Company, and he is pocketing this, he is soliciting some for himself and not for the Jergens Company, then the property wouldn't be transported at any less rate.

Mr. Cooper: From the carrier's standpoint it certainly would be. The money is being deprived the carrier. Therefore, they are not transporting it at the published rate.

Mr. Lippitt: They are getting their full rate.

Mr. Cooper: No, they are not.

The Court: They are getting their full rate and giving it back to this man.

Mr. Cooper: Your Honor, the cases are very broad on this. "by any device whatever".

The Court: I understand.

Mr. Cooper: That has this effect—

The Court: That is right.

29 Mr. Cooper: —of not getting full payment by the carrier.

The Court: I understand, but if the shipper gets it, it is less than the rate, but the carrier gets the money. He doesn't rebate it to the shipper, does he?

Mr. Cooper: It is lost. It is rebated to somebody and the effect is that the property was transported at a lesser rate.

Mr. Lippitt: If you followed your theory, Mr. Cooper, any money they spent for advertising, any money they spent to purchase a gift for any traffic manager or anybody employed by a shipper, then this law would be in effect and there would be tremendous and numerous prosecutions.

This is our theory of the case, your Honor, that the shipper paid no less than—and at no time would the shipper have received any benefit from this, if proven as true.

We have another theory in this case, but this is our principal legal contention here.

The Court: What would you say if it were an advertising concern, like Foster and Kleiser, and they say, "We give you our business of transporting our billboards—" rather, we will take it away from Red Ball Express and

give it to Black Ball Express, provided Black Ball Express will take a billboard. Would that be rebate?

30 Mr. Cooper: I don't think that would logically fall under the intention Congress had.

The Court: Why wouldn't it?

Mr. Cooper: For something like this?

The Court: A billboard would cost more than $150.00 out of $3,000.00.

Mr. Cooper: This is not legitimate advertising you are talking about spent by the company.

The Court: It is legitimate advertising, it is a concession.

Mr. Cooper: If it is a concession for shipment or placement of goods, if it is, then it falls under the cases.

The Court: A rebate means a concession to the shipper, doesn't it?

Mr. Cooper: Concession would certainly—not necessarily limited to the shipper. Concession could be rebate to anyone.

The Court: Would that be a violation of the statute?

Mr. Cooper: This advertising?

The Court: Yes.

Mr. Cooper: If it was done to procure the business of placement, yes, it would, because there is a Supreme Court case—I have the citation in my portfolio—where a railroad was trying to interest merchants to place their mar-

31 kets alongside the railroad yard, and they got the city to start offering these people money to put their markets alongside the railroad yard. They advertised this, that and the other thing, and they held there was rebate or concession.

Mr. Lippitt: But they had already done—they had already built a warehousing place and already leased it. That is the difference, they had already done these things, and it was between carriers and shippers. It didn't involve the city in that.

The Court: That makes all the difference in the world.

Mr. Lippitt: Every case you cited is between carriers and shippers.

The Court: If the carrier gets from the shipper the full amount of the tariff, the fact that the carrier might kick back some of it to some individual, would that be a violation of the statute?

Mr. Cooper: I think it would, your Honor, because it would have the effect of transporting at less than the published rates.

May I get my cases I have to support my theory?

The Court: Yes, I would like to see them.

Mr. Lippitt: May I be excused to get my file, if the court please?

32 The Court: Yes.

Mr. Cooper: One case I was looking for, your Honor, is Vandalia Railroad Co. v. United States, for example, cited on page 3.

The Court: That is a Seventh Circuit case?

Mr. Cooper: Yes. 226 F. 713. The court said:

"The statute evidently aims to prohibit, not only discrimination as between shippers, but departure from the tariff rates, irrespective of its actual discriminatory effect."

Mr. Lippitt: Finish reading it. "or conference of an advantage on the shipper", which is not true in this case, even if you prove what you said.

May I point out something to the court?

The Court: Yes.

Mr. Lippitt: In 1955, in United States v. General Motors Corporation, 226 F. 2d 745—

The Court: 226—

Mr. Lippitt: F. 2d 745. The court said, and this is also the headnote 3:—

The Court: Is this a case under prosecution under this Act?

Mr. Lippitt: Yes, it is, your Honor. The court said in headnote No. 3, which is taken bodily from the opinion:

"The crux of the prohibition in the Elkins Act—"

33 this is the Act we are talking about,

"—against rebates is receipt of an advantage by shipper and receipt of advantage is to be tested by actual result, not by intention. Elkins Act, Sec. 1(3) as amended 49 USCA Sec. 41(3)."

That is what we are talking about here, which this affirmed in previous language in 313 U.S. 450.

I think the prime case is the General Motors case here in 1955. The court at that time recognized the distinction we are trying to make here.

In no case in the case books, if the court please, is there a case on solicitation pure and simple.

Mr. Cooper: Your Honor, we submit this is a normal factual situation, but we also submit that the statute is broad enough to cover this. Merely because there is no case in point—

The Court: Are you suggesting as long as this statute has been on the books that this is the first time that an employee of the shipper ever solicited a rebate or got a rebate?

Mr. Cooper: No. There are no cases. It may be the first time it was ever prosecuted.

The Court: Why would that be? This is Judge
34 Leahy's case. Judge Leahy is reversed.

Mr. Lippitt: On another ground, your Honor.

The Court: Do you expect to prove that this was solicited on behalf of the Jergens Company?

Mr. Cooper: No, your Honor, strictly on behalf of the defendant.

The Court: As an individual?

Mr. Cooper: That is right, your Honor. May I cite one case to you?

The Court: Yes.

Mr. Cooper: It is an early case. United States v. Miller, 18 Fed. Supp. 388. I have the case right here. It is a little marked up.

The Court: Very well.

Mr. Cooper: It is a short case.

The Court: Well, this is a question of whether it applies to carrier-shipper or whether it applies to some outside person.

Mr. Cooper: That is right.

The Court: I already ruled it applies to this defendant. He can be guilty of it, but, as I read this, U. S. v. Miller, 18 Fed. Supp., as far as I have read, the charge was that the shipper was charged a minimum rate for the livestock, whereas he should have been charged the actual weight of the livestock.

35 Mr. Cooper: That is right.

The Court: Who got the benefit of the rebate, the shipper?

Mr. Cooper: The person who pocketed it was the bookkeeper.

The Court: He may have stolen it from the shipper after the shipper got it. He might have stolen it then.

Mr. Cooper: You are saying there has to be an advantage to the shipper of some kind? I agree that the cases do have—

The Court: Mr. Cooper, suppose some shipper here in Los Angeles shipped something to get a rebate back and some robber goes in tonight and robs the safe, you wouldn't say the robber was guilty of taking the rebate, would you?

Mr. Cooper: No, your Honor. I believe the shipper, as far as he knew, was paying the minimum rate and that the bookkeeper took the money, took the difference.

The Court: So they prosecuted the bookkeeper and he was guilty. There is no question about it.

Mr. Cooper: That is right. But the shipper didn't receive any lower rate.

The Court: If this man had solicited that rebate for Jergens there wouldn't be any question about it, either.

Mr. Cooper: Your Honor, in the Miller case the shipper paid as far as it was concerned the higher rate.

36 The Court: Wait a minute, now.

Mr. Lippitt: No, no.

The Court: Wait a minute.

Mr. Cooper: It was paying the full rate, as far as it knew.

The Court: So it wasn't guilty of a criminal act. The shipper was not guilty of knowingly accepting a rebate, was he, but, in truth and in fact, it was accepting a rebate unwittingly.

Mr. Cooper: I don't think so.

The Court: Listen to the indictment.

"That the defendants, well knowing the facts alleged in the indictment, unlawfully and knowingly received a rebate in respect to the aforesaid transportation of the aforesaid property of the difference between the true weight of the shipment and the minimum weight provided under the schedules and tariffs of rates."

Mr. Cooper: All right.

The Court: In other words, here is a company, namely, the Robert Bros. & Rose Live Stock Commission Company, shipping cattle and through this conspiracy they were being charged the minimum tariff, whereas they should have

been charged the tariff according to the true weight of the cattle.

I haven't read far enough to know how these de-
37 fendants got away with the money. How did they?

Mr. Cooper: How could they, unless by some—

The Court: They couldn't unless they robbed Robert Bros.

Mr. Lippitt: They falsified the records.

Mr. Cooper: Right. By some bookkeeping entry.

Mr. Lippitt: I believe that was why the bookkeeper was involved.

The Court: (Reading)

"By the twenty-first count of the indictment, the defendants are charged with conspiracy",

and so forth.

"These acts, as charged, in substance consist of: (a) Placing false weight figures upon the freight bills by the defendant Phil Miller; (b) making and writing of the checks by the defendant Phil Miller payable to the defendant Frank Sargent, from funds of Robert Bros. & Rose Live Stock Commission Company; (c) the appropriation for his own use of moneys obtained on these checks by the defendant Frank Sargent; (d) the placing of false weight figures upon the freight bills by the defendant Francis B. Hearty, covering the carload shipments."

Well, I suppose on the books of Robert Bros. & Rose Live Stock the full amount was debited as an expense.

38 Mr. Lippitt: But actually not paid.

Mr. Cooper: But the minimum went to the railroad. The difference went to the bookkeeper—

Mr. Lippitt: That is the difference.

Mr. Cooper: —by a bookkeeping entry.

The Court: But the goods were transported—

Mr. Cooper: At a full rate, so far as the shipper was concerned; he paid.

The Court: No, no. Later on he paid. But at the time he paid only the minimum rate.

Mr. Cooper: How could the bookkeeper get the money?

The Court: The carrier, the carrier got the minimum rate.

Mr. Cooper: Right. But the charge to the company was the full amount and the bookkeeper merely took the difference.

The Court: Here the carrier was to get the full rate—

Mr. Cooper: That is right.

The Court: —and kick it back to this defendant, according to your theory.

Mr. Cooper: That is right.

The Court: If this defendant had been acting for Jergens, even though he later embezzled the money from Jergens—

Mr. Cooper: Then you think it would fall under
39 this case?

The Court: I think it would clearly be in violation of the statute. But the statute is designed to assure equal treatment to the shipper.

Mr. Cooper: I agree with that.

The Court: The fact that this man was dishonest with his employer would be a state offense, but not federal.

Mr. Cooper: May I ask, do you feel that Congress intended—granted that the legislative intent was to prevent discrimination in favor of some shippers over others, do you think that Congress intended that, merely because the Government cannot prove that the shipper was in on it, that this would be outside the scope of the legislative intent here?

It is hard telling what kind of clandestine agreement you could have between an employee who is way down the line, who is doing this, and the shipper, merely because you can't prove it.

The Court: I know it.

Mr. Cooper: Does this fall without the purview of the statute?

Mr. Lippitt: I think the distinction is the advantage to the shipper.

The Court: Of course, you could prove it by circumstantial evidence. I don't know what the circumstances
40 are here, but you say your theory is that this defendant was going to pocket it himself.

Mr. Cooper: Yes, that is the evidence we have.

The Court: But supposing he wasn't, does that mean that the Government has no case? If he weren't and you

proceeded to trial on that theory and asked the jury to believe from circumstantial evidence he was doing this at the instance of his employer, I would say yes, there is clearly an offense.

Mr. Cooper: I am just saying, don't you feel that Congress would intend there should be some way to nip this thing in the bud without having to prove the shipper knew about it? There may be times when it would be impossible to prove it and yet it may take place.

The Court: It has to be whereby the shipper would—there has to be an advantage. There is no advantage here.

Mr. Cooper: You feel you have to prove that under the statute there is an advantage?

The Court: It has to be that situation in order to be a discrimination as between shippers. That is what it is designed to protect, the kickback, the rebate, and so forth, to certain favored shippers.

Mr. Cooper: You don't feel to prevent that you could bring an action against an employee without showing the shipper was in on it?

The Court: Congress could say, "Any employee of
41 a common carrier, any common carrier, any employee or agent or representative of a common carrier, who solicits a rebate shall be guilty of an offense." Yes, Congress can say that, with respect to interstate shipments. Congress hasn't said it. This is a very cumbersome statute.

Mr. Lippitt: Very.

The Court: When I read your cases, it is designed, I am convinced, to apply only in a case whereby any advantage or discrimination is practiced in favor of the shipper; the shipper.

Mr. Cooper: You don't think that—

The Court: It doesn't say that. You see, no one could pay this to this man, this freight forwarder or shipper or carrier couldn't pay this without embezzling it, really, from the carrier. No one could lawfully pay it, could lawfully give it to him. Any man that took that out of the treasury of this carrier and paid it to this defendant would be embezzling it in law.

Mr. Cooper: Definitely.

The Court: I don't care what his position is with the company.

Mr. Cooper: Definitely. The violation is at either end, the carrier's end or the shipper's end.

The Court: Congress could say, if it wanted to, that anybody who embezzles funds from a common carrier
42 engaged in interstate commerce would be guilty of a federal offense, but they have never said that.

Mr. Cooper: The embezzlement wouldn't apply to someone in the defendant's position.

The Court: It could say that any employee of any shipper or any agent of any shipper who solicits a rebate—

Mr. Lippitt: For his personal use.

The Court: —shall be guilty of an offense, whether for the benefit of the shipper or otherwise shall be guilty of an offense. But they haven't said that. They just haven't said it, that is all.

Now, I suppose they intended to leave it to the carrier to take care of the man. If he is guilty, which you say he is, to leave it to the Jergens Company to take care of him, to keep their skirts clean, because you could come into court and prosecute this man on the theory that the circumstantial evidence would convince the jury he was doing it for the carrier and if the jury were convinced from circumstantial evidence that he was—

Mr. Cooper: I understand your line of reasoning, your Honor.

The Court: —guilty of the offense because the carrier would be getting the discrimination.

Mr. Cooper: I see.

The Court: But if he is merely trying to make a
43 little money on the side out of the carrier, which the carrier could not lawfully pay, he could not lawfully receive, could he?

Mr. Cooper: No.

The Court: I assume he couldn't lawfully receive it. Under state statute it is a bribe, is what it amounts to.

Mr. Cooper: That is what it would be under state law.

The Court: We must remember these are federal statutes. They have to be strictly construed. This is the type of offense normally state law would punish.

Mr. Cooper: Yes.

Mr. Lippitt: I will stipulate to a dismissal, Mr. Cooper.

Mr. Cooper: Well, the effect of a dismissal then would

be without prejudice to any later stating of an offense under the statute?

The Court: Yes. That only refers to this offense.

Mr. Cooper: I see.

The Court: I will order it dismissed.

Mr. Lippitt: Thank you, your Honor.

Mr. Cooper: That is the court's order.

The Court: I will order it dismissed upon the ground the United States Attorney's statement of what he expects to prove, that the indictment does not state an offense
44 as construed by the United States Attorney.

If you want to you can prepare an order to that effect or the clerk can just enter a minute order.

Mr. Lippitt: I think a minute order will be sufficient.

The Court: State in the minutes that the United States Attorney, having represented to the court that the alleged solicitation was for the personal benefit of the defendant and not for the benefit of the shipper by whom he was employed, the court construes the indictment as not alleging a public offense under the federal statute, and upon motion by defendant orders the indictment dismissed without prejudice to the prosecution of the defendant for an offense within the provisions of 49 U.S.C. Section 41(1) if the plaintiff be so advised; plaintiff being the Government.

Mr. Cooper: A different offense would include an offense under 41(1) if we had the operative facts?

The Court: Yes, that is right.

Is there bail here?

Mr. Lippitt: No bail; OR, your Honor.

The Court: Very well. The defendant is discharged.

(Whereupon, at 11:25 o'clock a.m., Tuesday, June 26, 1962, an adjournment was taken.)

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45 (Reporter's certificate to foregoing transcript omitted in printing)

(File endorsement omitted)

46 IN UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF CALIFORNIA
CENTRAL DIVISION

No. 30912-CD

(Title omitted)

Notice of Appeal to the Supreme Court of the United States—Filed July 26, 1962

I

Notice is hereby given that the United States appeals to the Supreme Court of the United States from the order of June 26, 1962, dismissing the three-count Indictment which charged a violation of 49 U.S.C. § 41(1) for knowingly soliciting a concession and rebate in respect to the transportation of property in interstate commerce by a common carrier, whereby such property would be transported at a less rate and charge than that named in the tariffs published and filed by such carrier with the Interstate Commerce Commission.

The appeal is taken pursuant to 18 U.S.C. § 3731.

II

The Clerk will please prepare a transcript of the record in this cause, for transmission to the Clerk of the Supreme Court of the United States, and include in said transcript the following:

1. The Indictment.

47 2. All minute orders.

3. The trial memorandum of the United States, filed June 21, 1962.

4. The order of dismissal announced in Court on June 26, 1962.

5. The reporter's transcript of all proceedings on June 26, 1962.

III

The following question is presented by this appeal:

Whether in order to state an offense under 49 U.S.C. § 41(1) against a shipping clerk (employed by an inter-

state shipper) for soliciting a concession and rebate in respect to the transportation of property in interstate commerce, it is necessary to allege and prove that some advantage or discrimination would accrue in favor of the shipper, should the concession or rebate be granted.

Respectfully submitted,

FRANCIS C. WHELAN
United States Attorney

THOMAS R. SHERIDAN
Assistant U. S. Attorney
Chief, Criminal Section

CHARLES M. GARY COOPER
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Assistant U. S. Attorney

Attorneys for Plaintiff
United States of America

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48 (Proof of service omitted in printing)

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52 (Clerk's Certificate to foregoing transcript omitted in printing)

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53 SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1962

No. 506

UNITED STATES, *Appellant*,

vs.

JERRY BRAVERMAN

Order Noting Probable Jurisdiction—December 17, 1962

APPEAL from the United States District Court for the Southern District of California.

The statement of jurisdiction in this case having been submitted and considered by the Court, probable jurisdiction is noted and the case is placed on the summary calendar.

☆ U. S. GOVERNMENT PRINTING OFFICE 1962—670704/P O 727

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In the Supreme Court of the United States

OCTOBER TERM, 1962

No. —

UNITED STATES OF AMERICA, APPELLANT

v.

JERRY BRAVERMAN

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF CALIFORNIA

JURISDICTIONAL STATEMENT

OPINION BELOW

The order dismissing the indictment (Appendix, *infra*, p. 12) is not reported.

JURISDICTION

On June 26, 1962, the district court dismissed the indictment charging that appellee, an employee of a shipper, solicited a rebate from a common carrier in respect to the transportation of the shipper's property in interstate commerce, for failure to charge an offense under Section 1(1) of the Elkins Act, *infra*, p. 2, in that the indictment did not charge that some advantage would have accrued to the shipper if the solicited rebate had been granted. The jurisdiction of this Court to review on direct appeal a judgment

dismissing an indictment based on a construction of the statute upon which the indictment is founded is conferred by 18 U.S.C. 3731.

STATUTE INVOLVED

Section 1(1) of the Elkins Act (32 Stat. 847, 34 Stat. 587, 49 U.S.C. 41(1)) provides in pertinent part:

> * * * it shall be unlawful for any person, persons, or corporation to offer, grant, or give, or to solicit, accept, or receive any rebate, concession, or discrimination in respect to the transportation of any property in interstate or foreign commerce by any common carrier subject to said chapter whereby any such property shall by any device whatever be transported at a less rate than that named in the tariffs published and filed by such carrier, as is rerequired by said chapter, or whereby any other advantage is given or discrimination is practiced. * * *

QUESTION PRESENTED

Whether an indictment charging that an employee of an interstate shipper solicited a rebate from a common carrier in respect to the transportation in interstate commerce of the shipper's property states an offense under the Elkins Act even though it does not allege that some advantage would have accrued in favor of the shipper had the rebate been granted.

STATEMENT

On June 6, 1962, a three-count indictment was returned in the United States District Court for the Southern District of California, charging that Jerry Braverman, an employee of Andrew Jergens Com-

pany, violated Section 1(1) of the Elkins Act, *supra*, p. 2, by soliciting rebates from a common carrier in respect to the transportation of his employer's property in interstate commerce. The pertinent facts, as set forth in the indictment, are as follows:

The Andrew Jergens Company is a corporation engaged in the manufacture, distribution and sale of cosmetics and toiletries and maintains a distribution office and warehouse in Burbank, California from which it ships its products in interstate commerce. During the period from January 23, 1962, until March 6, 1962, the Jergens Company utilized the services of Superior Fast Freight, a freight forwarder doing business in Los Angeles, California, for various interstate shipments of its merchandise.[1] Superior Fast Freight had published and filed tariffs of its rates and charges with the Interstate Commerce Commission as required by law.

Count one of the indictment charged that on or about January 20, 1962, the appellee (Jerry Braverman), who was employed by the Jergens Company as the transportation manager of its Burbank branch, "did knowingly solicit" from Eugene Allen, traffic solicitor of Superior Fast Freight, a "concession and rebate" of two percent of the total freight bill revenues that Superior Fast Freight would receive in respect to any property tendered to it by the Jergens Company at Burbank and Los Angeles, California, for transportation in interstate commerce. Count two charged that on or about February 12, 1962, appellee

[1] The indictment enumerated representative shipments by Superior Fast Freight during this period.

knowingly solicited a rebate of $200 for shipments by the Jergens Company, and count three charged appellee with a similar solicitation on February 21, 1962 of $150 for every $3,000 in freight revenues received by Superior Fast Freight from the Jergens Company. Each count charged further that, if the solicited rebate had been granted, the property of the Andrew Jergens Company would have been transported at a lesser rate than that set forth in the applicable tariffs of Superior Fast Freight published and filed with the Interstate Commerce Commission.[2]

On June 26, 1962, the district court issued an order dismissing the indictment on the ground that it failed to charge a violation of the Elkins Act in that it did not allege that the Andrew Jergens Company (the shipper) would have gained an advantage over its competitors had the requested rebate been granted.

THE QUESTION IS SUBSTANTIAL

In ruling that the indictment did not charge an offense under Section 1(1) of the Elkins Act, *supra,* p. 2 because it failed to allege that, had the rebate solicited by the appellee been granted, some advantage would have accrued to the shipper (appellee's employer) as against other shippers, the district court improperly limited the scope and purpose of that legislation. By its restrictive interpretation, it significantly narrowed the reach of the statute as envisioned by Congress and imposed a burden of proof on the

[2] The Interstate Commerce Act, Part IV, as amended, 56 Stat. 284, 49 U.S.C. 1001 *et seq.*, deals with freight forwarders and 49 U.S.C. 1021(g) makes applicable to freight forwarding services the provisions of Section 1(1) of the Elkins Act.

government which the Act was designed to remove. Congress, in adopting the Elkins Act, was not seeking simply to eliminate the blatant and evident inequality and discrimination where the evidence was plain that a particular shipper had obtained a preference over his competitors as a result of a concession in a carrier's posted rates. Congress was also concerned with more sophisticated forms of discrimination. To root out all inequality it decreed that *any* diminution in the published tariffs constituted an inherently discriminatory practice, regardless of the nature of the scheme whereby the reduction was achieved and no matter the person or persons benefitted thereby. It was, in short, the congressional judgment that, unless the integrity of tariffs filed with the Interstate Commerce Commission was maintained, discrimination and inequality would be the inevitable result. The district court departed from this legislative judgment.

1. The language of the statute, its legislative history and the relevent judicial decisions support the government's interpretation of the Elkins Act and refute the reasoning of the district court.

a. The language of the statute makes it a criminal offense, *inter alia,* for any person to solicit a rebate "in respect to the transportation of any property in interstate or foreign commerce by any common carrier * * * whereby any such property shall by any device whatever be transported at a less rate than that named in the tariffs published and filed by such carrier * * * or whereby any other advantage is given or discrimination is practiced * * *". In express terms, therefore, the statute covers the acts charged

as criminal in this case: Appellee solicited a rebate relating to the transportation of property in interstate commerce by a common carrier whereby such property would be transported at a rate less than that provided in the published tariffs. There is not, as the district court held, an additional requirement that the granting of the rebate accrue to the advantage of a particular shipper. On the contrary, by outlawing any solicitation of a rebate which would result in a tariff reduction and then separately condemning "any other advantage * * * or discrimination * * *", Congress indicated that solicitation of a reduction from the published tariffs was, *per se*, a violation. Cf. *United States* v. *Michigan Portland Cement Company*, 270 U.S. 521, 524. Moreover, this Court has consistently recognized that the language of the Elkins Act is not to be grudgingly construed but is to be interpreted consistently with the broad purpose of the legislation to wipe out all forms of inequality in the provision of transportation. See *e.g.*, *Union Pacific R. Co.* v. *United States*, 313 U.S. 450; *Armour Packing Co.* v. *United States*, 209 U.S. 56; *New York, New Haven and Hartford Railroad Co.* v. *Interstate Commerce Commission*, 200 U.S. 361. It is wholly inconsistent with this approach to hold that, regardless of the statute's sweeping language, the rebate prohibition shall be deemed to cover only the case where a resultant advantage to a particular shipper is shown. Cf. *Interstate Commerce Commission* v. *North Pier Terminal Co.*, 164 F. 2d 640, 643 (C.A. 7), certiorari denied, 334 U.S. 815.

b. The history of the Elkins Act is well known. This statute was adopted in order to strengthen the original Interstate Commerce Act of 1887 (24 Stat. 379) by plugging loopholes which experience in the enforcement of the earlier legislation had revealed. The Interstate Commerce Commission reported to Congress shortly before the Act's adoption (Annual Report, I.C.C., January 17, 1902, p. 8):

> The [Interstate Commerce] act requires carriers to publish interstate rates and adhere to such published tariffs. But the tenth section, as construed by the courts, does not punish, otherwise than by a possibly nominal fine, a departure from the published tariff, unless there is actual discrimination between shippers. To convict for unjust discrimination it is necessary to show not merely that the railway company paid a rebate to a particular shipper, but it must also be shown that it did not pay the same rebate to some other shipper with respect to the same kind of traffic moving at the same time under similar conditions. As a practical matter this is almost always impossible. For this reason prosecutions otherwise sustainable can rarely be successful; and this is particularly the case where there is an extensive demoralization of rates, and consequently the greatest need for the application of criminal remedies. *Departure from the published rate is the thing which can be shown and the thing which should be visited with fitting punishment.* [Emphasis added.]

Congress' purpose to translate the Commission's recommendations into remedial legislation is shown by the report of the House Committee on Interstate

and Foreign Commerce on Senate Bill No. 7053, which, as amended, became the Elkins Act (See H. Rep. No. 3765, 57th Cong., 2d sess.). The particular evasions brought to the attention of Congress were different in detail, but not in essence, from the problem of this case. Congress found that there was such a general departure from rates that it was impossible to show that one shipper was being preferred to another, i.e., that one shipper had an advantage over others. It decided that the only completely satisfactory method of weeding out the various abuses was to make all departures from the published rate a crime. It recognized "that there is not only a relation, but an indissoluble unity between the provision for the establishment of * * * rates * * * and the prohibitions against preferences and discrimination," *Texas and Pacific Railway Co.* v. *Abilene Cotton Oil Co.*, 204 U.S. 426, 440.[3] In short, Congress recog-

[3] The Committee Report stated in pertinent part (p. 5): "The existing law prohibits rebates and discriminations, but does not prevent the cutting of published rates unless discrimination is shown. In most cases it is practically impossible to show the discrimination. In the investigations made by the Interstate Commerce Commission respecting rates on dressed beef and packing-house products from Kansas City and Chicago it was finally discovered that for years the railroads had constantly and habitually disregarded their published tariffs and had carried such products at rates below the published tariff to an amount so great that the difference between the published rate and the actual rate amounted to millions of dollars a year: and it was the unanimous testimony that all shippers who were interested in those rates got practically the same rate. There was, therefore, no discrimination between the shippers, and no shipper was liable to prosecution for obtaining a rate which discriminated in his favor. But the effect of such secret cutting of rates is to place in the hands of a small aggregation of

nized that departure from rates, directly or indirectly, makes for discrimination, and it therefore undertook to eliminate the necessity of showing an advantage to a particular shipper as a result of such a departure. The ruling of the district court would reinstitute a requirement which Congress deliberately abandoned many decades ago.

c. The pertinent cases similarly hold that no advantage need be shown to a particular shipper to permit prosecution under the Act. *Dye* v. *United States*, 262 Fed. 6, 9 (C.A. 4); *Interstate Commerce Commission* v. *North Pier Terminal Co.*, 164 F. 2d 640, 643 (C.A. 7), certiorari denied, 334 U.S. 815; *United States* v. *Delaware L. & W. R. Co.*, 152 Fed. 269, 273 (C.C.S.D.N.Y.); *United States* v. *Miller*, 18 F. Supp. 389 (D. Neb.). Thus in the *Delaware* case, *supra*, decided some four years after the adoption of the Elkins Act, the carrier demurred to an indictment charging it with the illegal payment of rebates on the ground that

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shippers the absolute control of the business, because no person can afford to enter into competition who does not receive the cut of rates, and no person is in a position to demand or receive such cut until after he shall have become established in business and have an extensive business behind him.

"The bill which we recommend provides a penalty, * * * against any person or corporation which shall give or receive any rebate, concession, or discrimination in respect to the transportation of property whereby such property shall be transported at a less rate than that named in the tariffs published and filed in accordance with the interstate-commerce law. This provision makes it a penalty against the railroad company to give to anyone a rate less than the published rate while that rate remains in force, and it also makes it a penalty against any person receiving the benefit of a rate less than the published rates."

the payment had not gone to the shipper but to the shipper's employee, who had arranged to bring in his employer's business. In overruling the demurrer, the district court stated (152 Fed. at 273), "the mere fact that a rebate is not paid to the shipper, but is paid to somebody else, is quite immaterial under the Elkins Act. If it is in fact a rebate, concession, or discrimination whereby the property is transported at a less rate than that named in the tariff, the unlawful act is committed." See, also, *Spencer Kellogg & Sons* v. *United States,* 20 F. 2d 459 (C.A. 2), certiorari denied, 275 U.S. 566; *Vandalia R. Co.* v. *United States,* 226 Fed. 713 (C.A. 7); *Interstate Commerce Commission* v. *Reichmann,* 145 Fed. 235 (C.C.N.D. Ill.); *United States* v. *Milwaukee Refrigerator Transit Co.,* 145 Fed. 1007 (E.D. Wis.)

The courts have also recognized that no collusion is necessary between shipper and carrier to punish either one for a statutory violation (*United States* v. *Koenig Coal Co.,* 270 U.S. 512, 519–520); that any person, regardless of whether he is a shipper or carrier, may be guilty of a discriminatory practice under the statute. (*Union Pacific R. Co.* v. *United States,* 313 U.S. 450; *Spencer Kellogg & Sons* v. *United States,* 20 F. 2d 459 (C.A. 2), certiorari denied, 275 U.S. 566); and that the statutory prohibition applies to any device or scheme by which discrimination and inequality are attempted or achieved (*Armour Packing Co.* v. *United States,* 209 U.S. 56, 72.) For, as this Court has stated, "the purpose of Congress in the Elkins law was to cut up by the roots every form

of discrimination, favoritism and inequality," *United States* v. *Koenig Coal Co., supra,* 270 U.S. at 519.

2. Unless conduct like appellee's is held subject to effective criminal sanction, a common carrier would either have to pay the "bribe" demanded by a shipper's agent or face the danger of losing the shipper's business. If the carrier did pay the rebate, other interested carriers would be prejudiced by the secret agreement.[4] And if these competing carriers learned of the "shakedown," a kind of undisclosed competition could result, with carriers vying with each other in offering bribes to shipping agents in order to procure the business of their principals. The upshot could well be the very "rate wars, detrimental to the efficiency of the carriers" which it was a principal purpose of the Act to prevent. See *Union Pacific R. Co.* v. *United States,* 313 U.S. 450, 463.

CONCLUSION

It is respectfully submitted that the question presented is a substantial one and that this Court should note jurisdiction of the appeal.

ARCHIBALD COX,
Solicitor General,
HERBERT J. MILLER, JR.,
Assistant Attorney General.
BEATRICE ROSENBERG,
JEROME M. FEIT,
Attorneys.

SEPTEMBER 1962.

[4] "The purpose of the statute is to protect the carrier, as well as the shipper, * * *". *United States* v. *Miller*, 18 F. Supp. 389, 391 (D. Neb.).

APPENDIX

United States District Court
Southern District of California
Central Division

No. 30912, Criminal
MINUTES OF THE COURT

Date: June 26, 1962.
At: Los Angeles, Calif.

U.S.A.
vs.
JERRY BRAVERMAN

Present: Hon. Wm. C. Mathes, district judge; deputy clerk, W. E. Payne; reporter, Virginia Wright; U.S. attorney, by Assistant U.S. Attorney Charles M. Gary Cooper; defendant on O/R; counsel, Charles L. Lippitt (retained).

Proceedings: For jury trial. Indictment in three counts.

Court convenes at 10 a.m. All present as shown.

All members of counsel, defendant, and the reporter approach the bench out of hearing of the prospective jurors. A general conference is had among counsel and court. Legal citations are presented by both sides.

Counsel for Government having represented to the court that the solicitations alleged in the indictment were for the personal benefit of defendant, and not for the benefit of the shipper by whom he was employed, the court construes the indictment as not alleging a

public offense under the Federal statute; and, upon motion by defendant, orders the indictment dismissed without prejudice to the prosecution of the defendant for an offense within the provisions of title 49 U.S.C., sec. 41(1), if the plaintiff be so advised.

[SEAL]

JOHN A. CHILDRESS,
Clerk,

By W. E. PAYNE,
Deputy Clerk.

WM-6/26/62.

U.S. GOVERNMENT PRINTING OFFICE 1962

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In the Supreme Court of the United States

OCTOBER TERM, 1962

No. 506

UNITED STATES OF AMERICA, APPELLANT

v.

JERRY BRAVERMAN

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF CALIFORNIA

BRIEF FOR THE APPELLANT

OPINION BELOW

The order dismissing the indictment (R. 9–10) is not reported.

JURISDICTION

The order of the district court dismissing the indictment for failure to charge an offense under Section 1 of the Elkins Act was entered on June 26, 1962 (R. 9–10, 26). Notice of appeal to this Court was filed in the district court on July 26, 1962 (R. 27–28). Probable jurisdiction was noted on December 17, 1962 (R. 28). The jurisdiction of this Court to review, on direct appeal, a judgment dismissing an indictment based on a construction of the statute upon

which the indictment is founded is conferred by 18 U.S.C. 3731.

STATUTE INVOLVED

Section 1 of the Elkins Act (32 Stat. 847, as amended, 34 Stat. 587–588, 49 U.S.C. 41(1)), provides in pertinent part:

> * * * The willful failure upon the part of my carrier subject to said chapter to file and publish the tariffs or rates and charges as required by said chapter, or strictly to observe such tariffs until changed according to law, shall be a misdemeandor, and upon conviction thereof the corporation offending shall be subject to a fine of not less than $1,000 nor more than $20,000 for each offense; and it shall be unlawful for any person, persons, or corporation to offer, grant, or give, or to solicit, accept, or receive any rebate, concession, or discrimination in respect to the transportation of any property in interstate or foreign commerce by any common carrier subject to said chapter whereby any such property shall by any device whatever be transported at a less rate than that named in the tariffs published and filed by such carrier, as is required by said chapter, or whereby any other advantage is given or discrimination is practiced. Every person or corporation, whether carrier or shipper, who shall, knowingly, offer, grant, or give, or solicit, accept, or receive any such rebates, concession, or discrimination shall be deemed guilty of a misdemeandor, and on conviction thereof shall be punished by a fine of not less than $1,000 nor more than $20,000: *Provided,* That any person, or any officer or director of any cor-

poration subject to the provisions of sections 41, 42, or 43 of this title or of chapter 1 of this title, or any receiver, trustee, lessee, agent, or person acting for or employed by any such corporation, who shall be convicted as aforesaid, shall, in addition to the fine herein provided for, be liable to imprisonment in the penitentiary for a term of not exceeding two years, or both such fine and imprisonment, in the discretion of the court. * * *

QUESTION PRESENTED

Whether an indictment charging that an employee of an interstate shipper solicited a rebate from a common carrier in respect to the transportation in interstate commerce of the shipper's property states an offense under the Elkins Act, even though it does not allege (and the government does not intend to prove) that some advantage would have accrued to the shipper had the rebate been granted.

STATEMENT

On June 6, 1962, a three-count indictment was returned in the United States District Court for the Southern District of California, charging that appellee, an employee of the Andrew Jergens Company, violated Section 1 of the Elkins Act, *supra*, pp. 2–3, by soliciting rebates from a common carrier in respect to the transportation of his employer's property in interstate commerce (R. 1–3). The pertinent facts, as detailed in the indictment, are as follows:

The Andrew Jergens Company, a corporation engaged in the manufacture, distribution, and sale of

cosmetics and toiletries, maintains a distribution office and warehouse in Burbank, California, from which it ships some of its products in interstate commerce.[1] During the period from January 23, 1962, until March 6, 1962, the Jergens Company utilized the services of Superior Fast Freight, a freight forwarder, for various interstate shipments of its merchandise from Burbank, California, to points in Oregon and Washington.

Count one of the indictment charged that, on or about January 20, 1962, the appellee, who was employed by the Jergens Company as transportation manager of its Burbank branch, "did knowingly solicit" from Eugene Allen, traffic solicitor of Superior Fast Freight, a "concession and rebate" of two percent of the total freight bill revenues that Superior Fast Freight would receive in respect to any property tendered to it by the Jergens Company at Burbank and Los Angeles, California, for transportation in interstate commerce (R. 2). Count two charged that on or about February 12, 1962, appellee knowingly solicited a rebate of $200 for shipments by the Jergens Company (R. 2–3), and count three charged appellee with a similar solicitation on February 21, 1962, of $150 for every $3,000 in freight revenues received by Superior Fast Freight from the Jergens Company (R. 3). Each count charged further that, if the solicited rebate had been granted, the property of the Andrew Jergens Company would have been trans-

[1] The principal business office of the Andrew Jergens Company is located in Cincinnati, Ohio.

ported at a lesser rate than that set forth in the applicable tariffs of Superior Fast Freight which are published and filed with the Interstate Commerce Commission.[2]

On June 26, 1962, after hearing argument of counsel (R. 10–26), the district court issued an order dismissing the indictment on the ground that it failed to charge a violation of the Elkins Act in that it did not allege, nor did the government intend to prove, that the Andrew Jergens Company (the shipper) would have gained an advantage had the request for a rebate by appellee (its employee), been granted (R. 9–10, 24).

SUMMARY OF ARGUMENT

The district court held that the indictment in the present case did not charge an offense because it did not allege (and the government did not intend to prove) that appellee's employer would have obtained an advantage if the solicited rebate had been granted. In construing the Elkins Act to require a showing of an advantage to a particular shipper, the district court interpreted the statute contrary to the purpose of Congress in enacting the legislation. Congress sought to prevent the possibility of discrimination and to protect carriers from the pressures of ship-

[2] The Interstate Commerce Act, Part IV, as amended, 56 Stat. 284 (Sec. 421(g), 49 U.S.C. 1021(g)), makes applicable to freight forwarding services the provisions of the Elkins Act. The indictment specified that Superior Fast Freight was a forwarder subject to the Interstate Commerce Act and the subsequent Acts amendatory thereof (R. 1).

pers by proscribing *all* departures from the published tariff.

A. The language of Section 1 of the Elkins Act manifests this broad purpose. Congress made it a criminal offense for any person to solicit a rebate with respect to the interstate transportation of property by a common carrier which would result in the property being transported at a lower rate than that set forth in the published tariffs. The rate is lower if the carrier gives a rebate to any person who arranges the shipment. There is no additional statutory requirement that benefit to a particular shipper result from the rebate. Consideration of the other provisions of the Elkins Act establishes that any such additional requirement would be inconsistent with the structure of the Act.

B. The legislative history of the Elkins Act compels the same conclusion. The Interstate Commerce Commission reported to Congress that large trusts were secretly getting uniform cut rates with respect to the interstate transportation of meat products and that prosecution under existing legislation was not feasible since it could not be shown that there was discrimination among these shippers. The Commission urged that departure from the published rate be made *per se* illegal. The House Report on the bill which became the Elkins Act clearly shows that Congress agreed. When in 1906 Congress adopted the Hepburn Act, it reiterated its aim to put a complete stop to rebates in every shape and form, and to prevent any departure whatever from the published tariff rates.

C. The pertinent case law also reveals consistent judicial recognition that no advantage to a particular shipper need be shown in prosecutions for acts which result in a departure from the published rates. See *e.g., United States* v. *Delaware, L. & W. R. Co.*, 152 Fed. 269, 273 (S.D.N.Y.); *Dye* v. *United States*, 262 Fed. 6, 9 (C.A. 4); *United States* v. *Miller*, 18 F. Supp. 389, 390–391 (D. Neb.). Several cases have upheld the applicability of the Elkins Act to conduct indistinguishable from that alleged in the indictment of Braverman.

D. The decision below would undermine the purposes of the Elkins Act in several important respects.

1. It could lead to economic injury to, and rate wars among, carriers. Carriers would be forced either to pay the "bribe" demanded by the traffic manager of a shipper or lose the shipper's business. If such practices spread, the result would be unfair and destructive secret competition contrary to the purpose of the Elkins Act and the more recent Congressional announcement under its "National Transportation Policy".

2. The ruling that prosecutions depend on proof that a particular shipper obtained an advantage as a result of a rate departure would reinstate a burden of proof which Congress deliberately eliminated when it adopted the Elkins Act.

3. The ruling below impairs Congress' purpose to insure that transportation rates will be openly established and rigidly followed. The public interest in an adequate and efficient transportation system, run at

reasonable charges, can be fully served only if there can be complete reliance upon the representation that the published rate is the rate actually charged.

ARGUMENT

THE ELKINS ACT PROSCRIBES ANY DEPARTURE—WHETHER ATTEMPTED OR ACTUAL—FROM A CARRIER'S OPEN PUBLISHED TARIFFS, IRRESPECTIVE OF WHETHER ANY PARTICULAR SHIPPER OBTAINS AN ADVANTAGE THEREBY

The single issue posed in this case is whether an indictment which charges that an employee of an interstate shipper solicited a rebate from a common carrier in respect to the transportation of his employer's property in interstate commerce states an offense under Section 1 of the Elkins Act, *supra*, pp. 2–3, even though the indictment does not charge that the rebate, if it had been granted, would have benefited the shipper. The district court held that the indictment did not charge an offense because it did not allege that the shipper (appellee's employer) would have obtained an advantage from the rebate. As the district judge phrased his judgment, he was "convinced" that the Elkins Act would "apply only in a case whereby any advantage or discrimination is practiced in favor of the shipper." (R. 24, see R. 9–10, 26.)

This interpretation improperly narrows the statute and impairs its purposes. It erroneously assumes that the Elkins Act meant to prohibit only the obvious discrimination among shippers which occurs where one obtains an advantage denied to another

overlooking the fact that Congress wanted to eliminate all possibility of discrimination by outlawing any departure whatsoever from the published rate. The patent inequality which takes place whenever a particular shipper achieves an advantage over his competitors as a result of a rebate was already prohibited by the original act of 1887.[3] In the Elkins Act, Congress sought to extirpate all discriminatory practices—the sophisticated as well as the crude—by prohibiting any diminution or departure from the published, open tariff. In short, it sought to prevent discrimination by maintaining the integrity of open, published tariffs.

A. THE STATUTORY LANGUAGE SHOWS THE CONGRESSIONAL PURPOSE TO MAKE IT A CRIME TO DEPART FROM THE PUBLISHED TARIFF IN RESPECT TO THE INTERSTATE SHIPMENT OF PROPERTY, REGARDLESS OF THE PERSON OR PERSONS ACTUALLY BENEFITED BY SUCH A DEPARTURE

The Elkins Act makes it a criminal offense, *inter alia,* for "any person * * * to offer, grant, or give, or to solicit, accept, or receive any rebate, concession, or discrimination in respect to the transportation of any property in interstate or foreign commerce by any common carrier * * * whereby any such property shall by any device whatever be transported at a less rate than that named in the tariffs published and filed by such carrier * * *." In precise terms, therefore, the statute proscribes the acts charged as

[3] See Sen. Rep. No. 46, Part I, 49th Cong., 1st Sess., pp. 188–191, 215–216; Sharfman, *The Interstate Commerce Commission*, Part I, pp. 17–21 (1931 ed.).

criminal in this case: Appellee solicited a rebate relating to the transportation of property in interstate commerce by a common carrier whereby such property would be transported at a rate less than that provided for in the published tariff. There is nothing in the statutory language which imposes, as an additional prerequisite to criminal responsibility, the requirement that it be shown that the rebate, had it been granted, would have accrued to the benefit of a shipper.[4] Indeed, consideration of other provisions of the Elkins Act, as amended, establishes beyond doubt that the central and controlling purpose of the Act was to preserve the integrity of the published tariff, without any attempt to trace the consequences resulting from a departure.

Section 41(2) of Title 49 provides that any departure by a carrier from the filed tariff rate "or any offer to depart therefrom, shall be deemed to be an

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[4] The coverage of the statute is plainly not limited by the penalty clause of Section 1 (see *supra*, pp. 2–3) which, among other things, punishes a violation by "[e]very person or corporation, whether carrier or shipper." As this Court has said, these words "were added by the Hepburn Act [34 Stat. 584, 588] as an amendment to § 1 of the Elkins Act to make clear that the earlier phrase 'any person, persons or corporation' included shippers as well as carriers. In our view action by any person to bring about discriminations in respect to the transportation of property is rendered unlawful by the Elkins Act. Any other conclusion would do violence to a dominant purpose of carrier legislation." *Union Pacific R. Co.* v. *United States*, 313 U.S. 450, 463; see also *Spencer Kellogg & Sons* v. *United States*, 20 F. 2d 459, 461 (C.A. 2), certiorari denied, 275 U.S. 566.

offense under this section." The provision operates without regard to any showing of advantage to, or discrimination among, particular shippers. Section 41(3) declares that any shipper or other person delivering property to a common carrier for interstate transportation who receives from the common carrier any rebate from the published tariff rates is subject to a civil penalty. Again, the existence of discrimination is irrelevant. Section 43 directs the the Interstate Commerce Commission to institute an equity proceeding whenever it has reason to believe that a common carrier is transporting passengers or freight at less than the published rates and, "upon being satisfied of the truth of the allegations of said petition said court shall enforce an observance of the published tariffs * * *" regardless of whether any discrimination among shippers is also shown. Finally, the very provision which formed the basis of the present indictment is merely the last half of a sentence which begins by making it a misdemeanor for any carrier to fail strictly to observe its filed tariffs regardless of the nature or results of the departure.

Construed against the background of these complementary provisions, the scope of the Act's prohibition of solicitation of rebates by any person is entirely clear. Even without an explicit provision prohibiting solicitation of departures from the filed tariff, any such solicitation would, we assume, be punishable under 18 U.S.C. 2 as an attempt to induce or procure the commission of a crime by the carrier. Sec-

tion 41(1) of Title 49—the basis of the present indictment—merely made it absolutely clear that not only a carrier's departure from the tariff but the solicitation, by any person, of a departure is unlawful.[5]

Thus, both the plain language of the applicable provision of the Elkins Act and the character of its other prohibitions reveal the congressional purpose "to prevent a departure from the published rates and schedules in any manner whatsoever." *American Express Co.* v. *United States,* 212 U.S. 522, 532. The statute aims to "prohibit, not only discrimination as between shippers, but departure from the tariff rates, irrespective of its actual discriminatory effect." *Vandalia R. Co.* v. *United States,* 226 Fed. 713, 716 (C.A. 7), certiorari denied, 239 U.S. 642. To rule, as did the district court, that the statute proscribes solicitation of a rebate[6] only where it can be shown that it is intended to benefit a shipper (or harm a competitor) is "to restrain the effect of the language used so as not to include acts exactly described * * *." See *United States* v. *Koenig Coal Co.,* 270 U.S. 512, 519.

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[5] It is well settled that the success of the solicitation is immaterial on the question of the applicability of the criminal sanctions of the Act. *E.g., United States* v. *Koenig Coal Co.,* 270 U.S. 512, 519–520; *United States* v. *Bunch,* 165 Fed. 736, 738 (E.D. Ark.).

[6] There is no reason to limit the word "rebate" to payment back to a shipper. It simply means that traffic is carried in interstate commerce at a charge in dollars and cents less than the published rate. See *United States* v. *Michigan Portland Cement Co.,* 270 U.S. 521, 524; *Vandalia R. Co.* v. *United States,* 226 Fed. 713, 716 (C.A. 7), certiorari denied, 239 U.S. 642.

B. THE LEGISLATIVE HISTORY OF THE ELKINS AND HEPBURN ACTS CONFIRMS THE PURPOSE OF CONGRESS TO PROHIBIT ANY DEPARTURE FROM (OR SOLICITATION OF A DEPARTURE FROM) THE CARRIER'S PUBLISHED RATES

1. The Elkins Act. The legislative history of the Elkins Act confirms what the language makes evident—that Congress meant the statute to apply to any person who offered, solicited, granted, or received a reduction from the publicly established rate, and that it intended the statute's prohibitions to be applicable wholly without regard to any showing of discrimination in favor of any particular shipper.

The Elkins Act was passed in order to plug the loopholes and repair the weaknesses which experience had revealed in the enforcement of the original Interstate Commerce Act of 1887 (24 Stat. 379). Cf. *United States* v. *Metropolitan Lumber Co.*, 254 Fed. 335, 341 (D. N.J.); *Chicago & A. Ry. Co.* v. *United States*, 156 Fed. 558, 562 (C.A. 7), affirmed, 212 U.S. 563. It represented legislative acceptance of principles repeatedly urged on Congress by the Interstate Commerce Commission. Moreover, it was supported not only by shippers but by carriers which were concerned with the depletion of their resources through forced rebates extorted from them by certain large shipping "trusts" (Sharfman, *The Interstate Commerce Commission*, Part I, p. 36 (1931 ed.)).

In its Annual Report to Congress in 1900, the Commission reported that "[s]ince the act to regulate commerce took effect, competition, harmful from the railroad standpoint, has consisted mainly in depar-

tures from the published rate," the result being debilitating rate competition. The carrier, the small shipper, and the public were suffering from secret rate-cutting arrangements, while the large shipping interests profited.[7] The Commission in its Annual Report of January 17, 1902 (pp. 6–16) stated the major problem and requested remedial legislation, as follows (p. 8):

> The [Interstate Commerce] Act requires carriers to publish interstate rates and adhere to such published tariffs. But the tenth section, as construed by the courts, does not punish, otherwise than by a possibly nominal fine, a departure from the published tariff, unless there is actual discrimination between shippers. To convict for unjust discrimination it is necessary to show not merely that the railway company paid a rebate to a particular shipper, but it must also be shown that it did not pay the same rebate to some other shipper with respect to the same kind of traffic moving at the same time under similiar conditions. *As a practical matter this is almost always impossible.* For this reason prosecutions otherwise sustainable can rarely be successful; and this is particularly the case where there is an extensive demoralization of rates, and consequently the greatest need is for the application of criminal remedies. *Departure from the published rate is the thing which can be shown and the thing which should be visited with fitting punishment.* [Emphasis added.]

[7] See Annual Report, I.C.C., December 24, 1900, p. 10. Annual Report, I.C.C., December 1897, pp. 46–48; Annual Report, I.C.C., December 15, 1902, pp. 6–8.

Shortly after the submission of this Report, both the Senate and House Committees on Interstate and Foreign Commerce held hearings on various bills which had been introduced to amend the original Act of 1887. During the hearings before the House Committee,[8] Commissioner Martin A. Knapp, then Chairman of the Interstate Commerce Commission, testified in detail in favor of remedial legislation. He disclosed that, in an investigation by the Commission into the shipping rates of dressed beef and packing-house products originating from Chicago and Kansas City, railroad officials for the first time had "admitted that for years they had constantly and habitually disregarded their published tariffs and had carried at rates below the published tariff an amount of traffic so great that the difference between the published rate and the actual rate amounts to billions of dollars a year, and yet it was the unanimous testimony that all the shippers who were interested in those rates got practically the same rate. There was no discrimination between Armour and Swift and between Hammond and Sulzburger." "No indictment will lie against those shippers, and no prosecution can be carried out and no punishment can be inflicted upon any of them, because you can not prove that there is any actual discrimination between them; they all got the same rate" (*Hearings,* p. 198).

[8] *Hearings before the Committee on Interstate and Foreign Commerce, House of Representatives, on the Bills to Amend the Interstate Commerce Law* (H.R. 146, 273, 2040, 5775, 8337, and 10930), *April 8–June 17, 1902, 57th Cong., 1st Sess.*

The harm to smaller or prospective shippers from this situation was later pointed out in House Report No. 3765, 57th Cong., 2d Sess., p. 5:

> * * * the effect of such secret cutting of rates is to place in the hands of a small aggregation of shippers the absolute control of the business, because no person can afford to enter into competition who does not receive the cut of rates, and no person is in a position to demand or receive such cut until after he shall have become established in business and have an extensive business behind him.

As Commissioner Knapp pointed out (Hearings, p. 198), what was in issue in this regard was "the case of great aggregations of shippers controlling enormous amounts of traffic which succeed in getting it carried entirely at rates below those which the general public have to pay * * *." The resulting harm to the carriers was also significant. The Elkins Act was "as much a necessary instrument for curbing the unconscionable tactics of the so-called trusts in extorting special favors from the carriers as a desirable extension of federal authority over the railroads." Sharfman, *The Interstate Commerce Commission*, Part 1 (1931 ed.), p. 36.* As Commissioner Knapp explained, a "railroad is not going to give a reduction and suffer under a cut rate if it is sure to get the traffic anyway. It makes that secret bargain in order to get the business from some other road. The revenue of the railroad is depleted, and the man

* Cf. *United States* v. *Miller*, 18 F. Supp. 389, 391 (D. Neb.): "The purpose of the statute is to protect the carrier, as well as the shipper * * *."

who really profits is the shipper who gets the cut rate * * *" (*Hearings*, p. 211).

To meet these problems, Commissioner Knapp repeatedly urged the Committee to adopt legislation which would make a departure from the published rate the test of criminal conduct without the additional, sometimes almost insuperable, burden of proving that such a lower rate operated in a particular shipper's favor (see *e.g., Hearings*, pp. 199–202, 211, 213, 257–264). Chairman Knapp's views were strongly seconded by Joseph W. Fifer, another member of the Interstate Commerce Commission (See *Hearings*, pp. 252–254). Commissioner Fifer unequivocally advocated "that a departure from the published rate should be made a discrimination, and treated as a discrimination" (p. 253).[10]

That Congress proposed to implement these recommendations is clear from the Report of the House Committee on Interstate and Foreign Commerce on Senate Bill No. 7053, which, as amended, became the Elkins Act (H. Rep. No. 3765, 57th Cong., 2d Sess.).[11]

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[10] In a similar vein, Chairman Knapp advised the Senate Committee on Interstate Commerce, that "the amendments of this law [the Interstate Commerce Act] which are most needful are those amendments which are most likely to secure the absolute preservation of tariff rates." *Hearings before the Senate Committee on Interstate Commerce*, "*Railway Freight Rates and Pooling*", 57th Cong., 1st Sess., p. 139.

[11] This bill had been originally introduced in the Senate on January 21, 1903 (36 Cong. Rec. 1030) and thereafter favorably reported, with amendments, by the Senate Committee on Interstate Commerce, but with no explanatory remarks (S. Rept. No. 2675, 57th Cong., 2d Sess., 36 Cong. Rec. 1298). It passed the Senate on February 3, 1903, with no debate (36 Cong. Rec. 1633–1634).

This Report quoted extensively and favorably from the testimony previously given the Committee by Commissioners Knapp and Fifer (pp. 1–5, see *supra*, pp. 15–17) and pointedly stated (p. 5):

> The bill which we recommend provides a penalty, * * * against any person or corporation which shall give or receive any rebate, concession, or discrimination in respect to the transportation of property whereby such property shall be transported at a less rate than that named in the tariffs published and filed in accordance with the interstate-commerce law. This provision makes it a penalty against the railroad company to give to anyone a rate less than the published rate while that rate remains in force, and it also makes it a penalty against any person receiving the benefit of a rate less than the published rates.
>
> Chairman Knapp stated to your committee that he favored making it a penal offense to make any departure from the published rates where there be a discrimination or not. * * *

Prior to the overwhelming approval of the bill in the House of Representatives, there was little debate on its substantive provisions (see 36 Cong. Rec. 2151–59), but what there was further indicated the congressional purpose to proceed "upon broad lines." Cf. *Armour Packing Co.* v. *United States*, 209 U.S. 56, 72.[12]

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[12] Congressman Hepburn, the Chairman of the House Committee, thus observed that under "this law it is made criminal to solicit, to receive, equally with the offer of the gift" (36 Cong. Rec. 2158). The bill was adopted in the House of Rep-

2. The Hepburn Act. In 1906, the Elkins Act was amended and strengthened by the Hepburn Act, 34 Stat. 584. The central purpose of the Hepburn Act was to invest the Interstate Commerce Commission with rate-making power (34 Stat. 586, 589–590).[13] In deciding that the Commission should have the power to fix maximum rates for the future, as well as provide redress for past excessive charges, Congress forcefully reaffirmed its conviction that any yielding or departure from published rates would be an intolerable interference with the regulatory scheme. Congress had been made aware of a continuing problem of rebates taking such forms as that of gifts to relatives of shippers.[14] Referring to this problem, the Senate and House reports accompanying the new legislation declared that the Hepburn Act was meant to put "a complete stop to rebates in

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resentatives on February 13, 1903 (36 Cong. Rec. 2159). The Senate thereafter concurred in the House amendments (36 Cong. Rec. 2176), and the bill was signed into law by the President on February 19, 1903 (36 Cong. Rec. 2438).

[13] Though the original Act of 1887 had not expressly granted prospective rate-making power to it, the Interstate Commerce Commission had acted under the assumption that such authority was inherent in the statute. In the middle 1890's, however, this Court decided that such power had not been granted the Commission. *Interstate Commerce Commission* v. *Cincinnati, New Orleans and Texas Pacific Railway Co.*, 167 U.S. 479. See Sharfman, *The Interstate Commerce Commission*, Part I (1931 ed.), pp. 25–27, 45–46.

[14] *Hearings before the Senate Committee on Interstate Commerce pursuant to Senate Resolution No. 288*, 58th Cong., 3d Sess., Vol. 2, p. 818; Vol. 4, p. 2995.

every shape and form. * * *"[15] The grant to the Commission of increased control over rates made it more important than ever that the rates published in the tariffs should be inviolable. As the Sixth Circuit explained in *Louisville & N. R. Co.* v. *Dickerson*, 191 Fed. 705, 709, an early case dealing with the rate-making powers granted by the Hepburn Act, "The cardinal purpose of the provisions for the public establishment of tariff rates is to secure uniformity, reasonableness, and certainty of charges for services. A rate once regularly published is no longer merely the rate imposed by the carrier, but becomes the rate imposed by law; and routes and rates once so established become matter of public right and forbid private contract inconsistent therewith." See also *Louisville and Nashville R.R.* v. *Mottley*, 219 U.S. 467, 476–477.

The legislative histories of both the Elkins Act and the Hepburn Act thus establish that Congress intended to deal with a variety of harmful practices by simple and comprehensive prohibitions of departures by carriers from their filed rates and of solicitations of such departures. In no uncertain terms,

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[15] See S. Rep. No. 1242, 59th Cong., 1st Sess., p. 2; cf. H. Rep. No. 591, 59th Cong., 1st Sess., p. 4.

Insofar as it directly amended Section 1 of the Elkins Act, the Hepburn Act, reinstituted imprisonment as a punishment and added the word "knowingly" and "whether carrier or shipper" to the penalty clause. As we have already noted (*supra*, p. 10, n. 4, this last amendment was to remove any doubt that the Elkins Act prohibitions were applicable to shippers as well as carriers, but was without any intent to limit the Act. See *Union Pacific R. Co.* v. *United States*, 313 U.S. 450, 462–463.

Congress sought to outlaw secret rebates without regard to the form such rebates might take or the person or persons receiving the benefit of the secret rate departures. Congress carefully and intentionally made irrelevant to the prohibitions of rebates such variables as whether demonstrable discrimination among shippers resulted, or whether the amount of the rebate was pocketed by the shipper, a relative of the shipper, his employee, or any other person. The statute was drawn to prohibit all departures and all solicitations of departures from the filed tariff. Any "person", as the statute makes explicit, whose intended acts will result in a departure from the published tariff is subject to the statute's criminal sanctions.

C. JUDICIAL INTERPRETATION OF THE ACT SUPPORTS ITS APPLICATION TO THE CIRCUMSTANCES OF THIS CASE

1. Soon after the adoption of the Elkins Act, the courts recognized that it prohibited "not only discrimination as between shippers, but departure from the tariff rates, irrespective of its actual discriminatory effect." *Vandalia R. Co. v. United States*, 226 Fed. 713, 716 (C.C.A. 7), certiorari denied, 239 U.S. 642. In accord with this interpretation, it was held that a carrier could be convicted of furnishing a rebate to a shipper even though there was no proof that the same concession had been denied to, or had worked a discrimination against, other shippers. The single test was whether the rebate constituted a reduction in the published tariff. See *e.g.*, *Vandalia R. Co.*, *supra*; *Chicago & A. Ry. Co. v. United States*, 156 Fed. 558, 562 (C.A. 7), affirmed, 212 U.S. 563; *Chicago, St.*

P., M. & O. Ry. Co. v. *United States*, 162 Fed. 835, 838–839 (C.A. 8), certiorari denied, 212 U.S. 579–580; *Pennsylvania Co.* v. *United States*, 257 Fed. 261, 264 (C.A. 7); *American Smelting & Refining Co.* v. *Union Pacific R. Co.*, 256 Fed. 737, 742 (C.A. 8). This view has persisted to the present time. See *Shaw Warehouse Co.* v. *Southern Railway Co.*, 288 F. 2d 759, 766 (C.A. 5), certiorari denied, 369 U.S. 850 ("the Elkins Act, * * * prohibits departure from the published tariff rates 'irrespective of its actual discriminatory effect' ").

This Court and the lower federal courts also early determined that the prohibitions of the Elkins Act are not directed to shippers and carriers alone. For example, the Elkins Act prohibits every person, whether or not a carrier, from offering or paying rebates. See *Union Pacific R. Co.* v. *United States*, 313 U.S. 450;[16] *Spencer Kellogg & Sons, Inc.* v. *United States*, 20 F. 2d 459 (C.A. 2), certiorari denied, 275 U.S. 566; *Interstate Commerce Commission* v. *Reichmann*, 145 Fed. 235 (N.D. Ill.). Cf. *Howitt* v. *United States*, 328 U.S. 189, 192–193, where this Court ruled that employees of a railroad who overcharged on tickets for their own personal gain were subject to

[16] In the *Union Pacific* case, this Court held that the Elkins Act prohibited a scheme whereby the City of Kansas City, Kansas, with substantial assistance from the Union Pacific Railroad, gave valuable inducements to produce dealers to persuade them to move their places of business from the produce market at Kansas City, Missouri, to a new terminal at Kansas City, Kansas. The necessary effect of such action was to secure the traffic of the dealers for the Union Pacific.

the criminal sanctions of the Interstate Commerce Act.

From these two established doctrines—that a showing of discrimination is unnecessary to establish a violation of the Act and that persons other than shippers and carriers are subject to its prohibitions—it was but a logical step for the courts to hold that the grant, receipt, or solicitation of the benefits of a carrier's departure from its published rates, *i.e.*, a rebate, is forbidden by the Elkins Act whether it is to be enjoyed by a shipper, his employee, or anyone else. *United States* v. *Delaware, L. & W. R. Co.*, 152 Fed. 269, 273 (C.C. S.D.N.Y.); *Dye* v. *United States*, 262 Fed. 6, 9 (C.A. 4); *United States* v. *Miller*, 18 F. Supp. 389, 390–391 (D. Neb.); *United States* v. *Milwaukee Refrigerator Transit Co.*, 145 Fed. 1007, 1012 (E.D. Wis.); cf. *Interstate Commerce Commission* v. *North Pier Terminal Co.*, 164 F. 2d 640, 643 (C.A. 7), certiorari denied, 334 U.S. 815; *Ohio Tank Car Co.* v. *Keith Ry. Equipment Co.*, 148 F. 2d 4, 7 (C.A. 7), certiorari denied, 326 U.S. 730; *United States* v. *Satuloff Bros.*, 79 F. 2d 846 (C.A. 2); *Terminal Warehouse Company* v. *United States*, 31 F. 2d 951, 958 (D. Md.).

The factual situation in the *Delaware* case, *supra*, decided some four years after the passage of the Act, was strikingly parallel to that involved here. The carrier demurred to an indictment charging it with the payment of rebates on the ground that the payment had not gone to the shippers who had paid the lawful rate, but to the shippers' agent (one Palmer) who had arranged to give the railroad his principals'

business. In overruling the demurrer to the indictment the court said (152 Fed. at 273):

> This indictment is substantially based upon the Elkins Act. That act was intended, among other things, to cover the cases where the rebates are not paid directly to the shipper. It provides in substance that it shall be unlawful for any carrier to give any rebate in respect of the transportation of any property in interstate commerce whereby any such property shall be transported at a less rate than that named in the tariff filed by the carrier. The test by this statute is whether the carrier has transported the property at a less rate than that named in the tariff. * * * the mere fact that a rebate is not paid to the shipper, but is paid to somebody else, is quite immaterial under the Elkins Act. If it is in fact a rebate, concession, or discrimination whereby the property is transported at a less rate than that named in the tariff, the unlawful act is committed. * * *

Appellee Braverman, like Palmer, used his control over the flow of his employer's property in interstate commerce to solicit secret payments from the carrier. Braverman's contention that his conduct does not fall within the scope of the Elkins Act because no advantage to his employer resulted from his conduct is unavailing for the same reason that an identical contention failed in the *Delaware* case: the Act prohibits both the solicitation and the granting of a rebate from the carrier's filed tariff regardless of whether there is a benefit to the shipper.

The *Delaware* case is not alone as precedent directly opposed to the decision below. The same result was reached on similar facts with respect to a refrigerator company that served as a shipping agent for various shippers and solicited rebates in *United States* v. *Milwaukee Refrigerator Transit Co.*, 145 Fed. 1007, 1012 (E.D. Wis.), and with respect to a bookkeeper of the shipper who, with various other persons unrelated to either the shipper or the carrier, solicited and obtained rebates with respect to transportation of property for the shipper in *United States* v. *Miller*, 18 F. Supp. 389. In each of these cases the shipper received no advantage from the rebates, yet in each case an indictment was held to lie under the Elkins Act against parties whose conduct was identical to that of appellee Braverman. See, also *Dye* v. *United States, supra*, where the prohibitions of the Elkins Act were held applicable to an employee of a carrier who utilized his position to obtain personal profit through the disbursement of an unauthorized number of railroad cars to a coal mine which, the court was willing to assume *arguendo*, never itself benefited from the illegal arrangement.[17] In sum, what the Second Circuit said in *Spencer Kellogg & Sons, Inc.* v. *United States*, 20 F. 2d 459, 460–461 (C.A. 2), cer-

[17] The *Dye* case was cited approvingly by this Court in *United States* v. *Koenig Coal Co.*, *supra*, 270 U.S. at 520, where, after stating that the Elkins Act was not to be strictly construed and that the words of the statute should be given their ordinary meaning, the Court detailed the facts of *Dye*, observing that the mine which received an excessive number of cars was "innocent of the inequality", and that *Dye* "did this for his personal profit * * *."

tiorari denied, 275 U.S. 566, is equally applicable here:[18]

> The application of the statute [the Elkins Act] is not limited to shippers and carriers, but includes and punishes any person or corporation whose intended acts result in the transportation of property at less rates than those mentioned in the tariffs lawfully published and filed by common carriers. * * *
>
> Its broad and sweeping language is a clear expression of the intendment of Congress to make the purposes of the act applicable to any person or corporation who might be in a position to commit an act which would accomplish the forbidden result, namely, the transportation of property at less rates than those named in the tariffs published by the carriers. * * *

2. The force of the decisions discussed above is, of course, not weakened by the fact that in specific contexts this Court has emphasized the purpose of the Elkins Act to "place all shippers upon equal terms" (*United States* v. *Union Stock Yard*, 226 U.S. 286, 309; see *Armour Packing Co.* v. *United States*,

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[18] In *Spencer Kellogg*, a grain elevator operator, neither a carrier nor a shipper, paid a rebate to a shipper and was held to have violated the Elkins Act. This decision was cited approvingly in the *Union Pacific* case (313 U.S. at 463) for the proposition that the Elkins Act may be enforced against all parties interested in the traffic.

It is provided in another section of the Elkins Act that, in any proceeding for the enforcement of the Act, "it shall be lawful to include as parties, * * * all persons interested in or affected by the rate, regulation, or practice under consideration * * *" (32 Stat. 848, 36 Stat. 1167, 49 U.S.C. 42).

209 U.S. 56, 72), and has said that "favoritism which destroys equality between shippers, however brought about, is not tolerated." *Union Pacific R. Co. v. United States*, 313 U.S. 450, 462).[19] The prevention of discrimination, while the central purpose of the prohibitions of departures from filed rates, is not the sole purpose of these prohibitions. The Act was intended to protect carriers as well. See *supra*, pp. 13–17. Moreover, the method adopted by Congress for destroying discrimination and favoritism in interstate transportation was the requirement of rigid adherence to the open, published tariff.[20] As this Court has recognized, "there is not only a relation, but an indissoluble unity between the provision for the establishment and maintenance of rates until corrected in accordance with the statute and the prohibitions against prefer-

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[19] It was this argument (R. 18–20) that appellee's counsel made to the district court in support of his claim that the indictment, as framed, did not charge a statutory offense. He cited language from *United States v. General Motors Corporation*, 226 F. 2d 745, 748 (C.A. 3), relying upon the *Union Pacific* case, *supra*, that the "crux of the prohibition in the Elkins Act against rebates is the receipt of an 'advantage' by the shipper * * *."

[20] See *e.g., Chicago & Alton R.R. Co. v. Kirby*, 225 U.S. 155, 165–166 ("The broad purpose of the Commerce Act was to compel the establishment of reasonable rates and their uniform application."); *New York, New Haven & Hartford R.R. Co. v. Interstate Commerce Commission*, 200 U.S. 361, 392 ("The all-embracing prohibition [was] against either directly or indirectly charging less than the published rates * * *."). To the same effect: *American Express Co. v. United States*, *supra*, 212 U.S. at 531–533; *Armour Packing Co. v. United States*, *supra*, 209 U.S. at 71–72; *Louisville & Nashville Railroad Co. v. Mottley*, *supra*, 219 U.S. at 476–477.

ences and discrimination." *Texas & Pacific Railway Co.* v. *Abilene Cotton Oil Co.*, 204 U.S. 426, 440. Whether this relationship is perceived to exist in any particular case is irrelevant. Congress has made the judgment that discrimination and secret rate demoralization are inextricably intertwined and that successfully to root out discriminatory rate-cutting requires an unyielding open tariff. The solicitation in this case sought a departure from the published tariff rate. Congress did not intend that such conduct should go unpunished. On the contrary, it made that very act decisive.

D. THE INTERPRETATION GIVEN THE STATUTE BY THE DISTRICT COURT WOULD HAMPER ENFORCEMENT OF THE ACT AND PREVENT THE EFFECTUATION OF ITS PURPOSES

1. The district court's construction of the statute would adversely effect the economic stability of common carriers. If solicitation of bribes by employees of shippers goes unpunished, a carrier who does not "play along" and pay what the agent demands runs a substantial risk of losing the shipper's business to another carrier. On the other hand, if the carrier were to pay the rebate, it would be transporting property in interstate commerce at a rate less than that fixed by law as just and reasonable. Even assuming that financial loss might not be serious in an isolated case, lasting economic injury could result should the secret "shakedown" mushroom into a generally prevailing practice among traffic managers—as indeed it might. Moreover, it is not improbable that competing carriers, learning of the secret arrangements, would

engage in undisclosed competition for the business of a shipper by making secret financial deals with shipping agents. The upshot of all such secret machinations could well be the very "rate wars, detrimental to the efficiency of the carriers" which it has been a purpose of carrier legislation to eliminate. See *Union Pacific R. Co.* v. *United States*, 313 U.S. 450, 463. The ancient and insidious practice of "squeeze" has no place in the transportation industry.

Carrier efficiency and economic stability were among the principal purposes of the Elkins Act. The Act had the support of the railroads among others (see *supra*, p. 13) and it reflected the aim of Congress "to protect the carrier, as well as the shipper * * *" (*United States* v. *Miller*, 18 F. Supp. 389, 391 (D. Neb.)). Moreover, Congress has continued to stress its legislative judgment as to the importance of guarding the stability and economic well-being of common carriers. Under the "National Transportation Policy" of 1940, 54 Stat. 899, it was declared to be the congressional purpose, *inter alia*, to "foster sound economic conditions in transportation and among the several carriers", to eliminate "unfair or destructive competitive practices", and to have all carrier legislation (of which the Elkins Act is part) "administered and enforced with a view to carrying out" this policy. As this Court has stated, this policy "was designed to eliminate destructive competition not only within each form [of carriage] but also between or among the different forms of carriage". See *Eastern-Central Motor Carriers Association* v. *United States*, 321 U.S.

194, 206; *McLean Trucking Co.* v. *United States*, 321 U.S. 67, 80–83. This purpose would be impaired if the Elkins Act were so construed as to permit an environment in which common carriers were faced with the constant threat of financial loss unless they complied with the monetary demands of shipping agents, or found it necessary, because of such demands, to compete among themselves for transportation business through the device of personal bribes to shipping agents.

2. It is not entirely clear whether the basis of the decision of the district court below was that a violation of the Elkins Act requires a showing of discrimination in favor of a particular shipper (see R. 24) or merely requires a showing that whatever rebate is given inures to the benefit of a shipper (see R. 9–10). In either event, however, the decision reimposes upon the government a burden of proof with regard to effects upon shippers which it was the statute's express purpose to remove. See *supra*, pp. 13–18. Tracing the ultimate enjoyment of the benefits of a carrier's departure from his filed rates may well be an impossible task in many instances. In some cases, complex secret arrangements involving rebates routed through a shipper's employee may successfully shield an intended discrimination in favor of particular shippers. In many other situations, even if the shipper knows nothing of the illegal activities of his employee, the grant of rebates to the employee will indirectly result in discriminatory benefits to the shipper who will find him-

self able to retain his employee's services for lesser compensation because of the amounts the employee received from the carrier. It was the central purpose of the Elkins Act to eliminate ambiguities and difficulties of proof such as these by proscribing simply and clearly every departure from filed rates and every invitation, regardless of the issuer, to a carrier to depart from its published rates.

3. In proscribing every secret departure from the published rates, no matter the identity of the beneficiary, the Elkins Act serves the paramount public interest in guaranteeing that transportation rates will be openly arrived at and faithfully complied with. The Act has the function "not merely of regulating the relations of carrier and shipper, *inter se*, but of securing the general public interest in adequate, nondiscriminatory transportation at reasonable rates." *Midstate Horticultural Co. Inc.* v. *Pennsylvania Railroad Co.*, 320 U.S. 356, 361. To determine fairly whether rates are "reasonable" and whether their reduction or increase is required by changing circumstances obviously presupposes that the rates already in force reflect the exact amount being charged. Adequate and efficient regulation of transportation services can hardly be expected to subsist or develop in an atmosphere of secret rates and clandestine competition. In sum, the reliance upon the fact that the published rate is the actual rate being charged to all in like circumstances is at the heart of a successful national transportation system. This case should not represent a departure from that policy.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the order of the district court should be reversed and the case remanded for further proceedings under the indictment.

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